Before the
Federal Communications Commission
Washington, DC, 20554

In the Matter of	)	
	)	
Petition for Declaratory Ruling to Clarify	)	WC Docket No. 11-118
47 U.S.C. § 572 in the Context of	)	
Transactions between Competitive Local	)	
Exchange Carriers and Cable Operators	)	

COMMENTS OF PUBLIC KNOWLEDGE

Public Knowledge takes no position on NCTA's interpretation of Section 652(b)'s restriction on cable buyouts of LECs. However, if the Commission does elect to approve NCTA's primary request it should make clear that Section 652 is not a substitute for the Commission's obligation to apply a public interest analysis to transactions within its purview. If the Commission declines to approve the primary request, it should refrain from granting NCTA's clarifications to unnecessarily expand the scope of forbearance authority and undermine the role of local oversight.

ARGUMENT

I. Section 652 does not create a safe harbor from public interest considerations.

Regardless of the Commission's handling of this petition, it must make clear that any acquisition is still subject to the public interest standard. This standard of review applies independently of and additional to any Section 652 obligations. NCTA argues that acquisition of a CLEC would further the Act's legislative goals by maintaining a "two-wire" system. Although this was, indeed, the rhetoric utilized in the passage of the Act, it has been drastically dated by

changing market conditions. To simply evaluate these transactions with a "two-wire" standard is to advocate a grossly oversimplified and outdated model, and such conclusions cannot reasonably be the endpoint of the Commission's analysis.

Cable operators' share of the last-mile market has increased substantially over the past decade, due to the demand for high-speed internet – an evolution that was not anticipated in the debate surrounding the Act. Because of these changing market conditions, a joint venture between a cable operator and LEC may superficially maintain a "two-wire" system while still failing a traditional public interest analysis. As a result, it is important that the Commission not simply accept the presence of two wires as a substitute for a rigorous public interest analysis. Rather, the Commission must consider each acquisition independently in light of its traditional public interest standards.

The Commission has a unique mandate to serve as a protector of the public interest in mergers of this type. Abandoning the Commission's role in protecting the public interest would be both short-sighted and irresponsible given the increased growth of cable in this arena.

II. The Commission should not attempt to extend its forbearance authority outside of Title II.

If the Commission declines to clarify that Section 652 does not apply to transactions between CLECs and cable operators, it must not move to limit the impact of Section 652 on such transactions.

In accordance with the language of Section 10, the Commission can only exercise its forbearance authority within the confines of Title II regulations and services. ("[T]he Commission shall forbear from applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services." Telecommunications Act of 1996 §10, 47 U.S.C.

§160(a)). NCTA, however, argues that the Commission forbear from enforcing the statute's requirement that Local Franchising Authorities [LFAs] approve any waivers of Section 652. *Petition for Declaratory Ruling to Clarify 47 U.S.C. 572 in the Context of Transactions between Competitive Local Exchange Carriers and Cable Operators*, [hereinafter *Petition*] 14. The Commission cannot simply pick and choose its forbearances across the entirety of the Act. Congress strictly limited the Commission to instances in which the parties and regulations fall within the scope of Title II.

Although it may be possible that some transactions outside the scope of this authority could be burdened by seemingly unnecessary regulation, the Commission does not have the power to expand forbearance authority beyond its statutory bounds. To do so would effectively provide the Commission a blanket opportunity to rewrite statutes whenever it saw fit. Although the forbearance authority is rooted in Congress' desire for flexibility, it does not extend to allowing the Commission to unilaterally alter the scope of its regulatory authority. Expanding forbearance reach beyond Title II would drastically alter the regulatory dynamic and create substantial uncertainty both in the market and for consumer interests.

III. Congress intended to strengthen local regulatory authority by granting power to Local Franchising Authorities.

NCTA argues that the FCC should constrain the operating authority of LFAs by imposing time limits and other procedural mandates on their approval process. *Petition* 14. This is counter to Congressional intent. Congress explicitly intended to limit the FCC's ability to remove LFAs from the process of granting a waiver to the cross-ownership restrictions, by mandating approval at the local level: "The Commission may waive the restrictions of subsections (a), (b), or (c) only if … the local franchising authority approves of such waiver." Telecommunications Act of 1996 §652(d)(6)(B). Empowering local agencies to hold veto power over waivers on cross-ownership

was part of an overall intent to minimize the FCC's reach and shift the burden of standardizing regulation to the court system:

> [I]f a cable company is getting a bad deal and being put off by a local government, they can go to court, but they go to court in that area, they do not have to come to Washington, DC. The avenue for remedy already exists … if there had been particular problems and there is a trend, they can establish a precedence [sic] in the court, and I think the local communities are going to realize if there is something wrong, they will not do it again because they will lose in court.

141 Cong. Rec. 8175 (statement of Senator Dirk Kempthorne). Senator Diane Feinstein added that the emphasis on localized regulation was a response to bureaucratic meddling on the part of the FCC: "The barrier for entry is clearly done away with by this section. … What we do change, however, is simply delete [sic] the ability of a remote technical commission to overturn a city decision and create an enormous hassle for cities all across this Nation." 141 Cong. Rec. S. 8174.

The inclusion of local licensing bodies was conceived as part of an overall shift by which regulatory burdens would be placed on local organizations that would be better equipped to determine the needs and pricing capacities of a given region. Senator Larry Pressler, in floor debate, emphasized that the regulatory system should fulfill the specific needs of state and local governments "while at the same time setting up a procedure to preempt where [sic] local and State officials act in an anticompetitive way." 141 Cong. Rec. S. 8134. Reducing the ability of an LFA to appropriately perform its duties by imposing procedural limitations from the federal level runs contrary to the federalist intent of this aspect of the Act.

Strengthening local authority over telecommunications services was a key goal of the 1996 Act. LFAs, by virtue of their unique insight on the demands of their areas, can ensure that telecommunications services provide access to diverse programming at rates that make such programming accessible to their communities. Although some cable operators may prefer to

avoid the obligation of seeking LFA approval, the Commission should not contravene the intent of Congress by exempting operators from their obligation.

CONCLUSION

In considering NCTA's proposal for clarification of Section 652(b), the Commission must be sure to focus on several key obligations. First, it must reiterate that mergers under Section 652 are nevertheless subject to public interest analysis. Second, it must not attempt to extend forbearance past the boundaries of Title II. Finally, it must honor Congress' intent to promote local licensing control by declining to issue mandates to LFAs.

Respectfully submitted,

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